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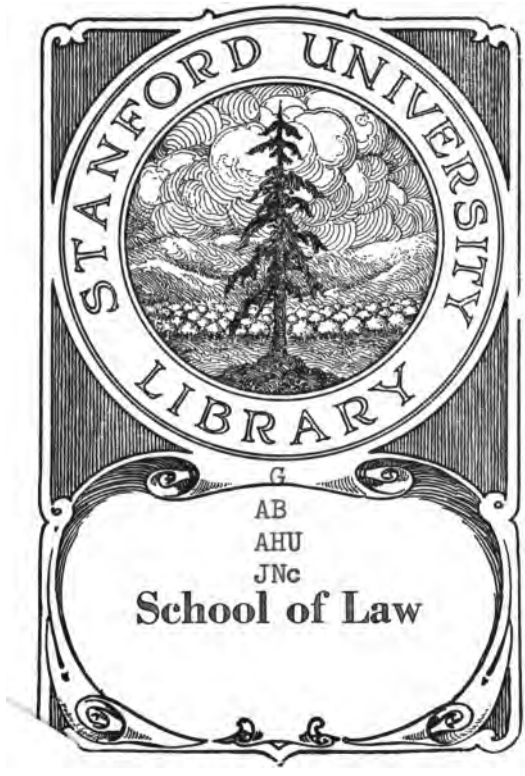

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CONSIDERATIONS

ON THE

ABOLITION

OF

THE COMMON LAW

IN THE

UNITED STATES.

"Is it not as this mouth should tear this hand
For lifting food to't?"

PHILADELPHIA:
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1809.

THE author of the following pages claims only the humble merit of recalling recollection to things well known to many who may read them; and of communicating to others of his fellow citizens, some information upon a subject of the last importance to them, but which has, perhaps, been so much beside their usual walks, as not to have received a just consideration. The lawyer will discover nothing but what he has long been familiar with. The facts stated have so frequently recurred to his experience, and the conclusions are so obvious to his reflections, that he will scarcely admit the necessity of this attempt to explain and enforce them. It is, however, certainly true that very persevering efforts have been made, for some years, in Pennsylvania, by some mis-

taken men, to bring the Common Law into public odium and disuse. The national spirit has been excited to reject, with disdain, a system of laws derived from that country, whose supremacy we have so happily thrown off; and every source of discontent has been stirred to procure its expulsion. It has been ridiculed and contemned as a relic of barbarism unworthy of this more enlightened age; unsuited to our superior wisdom and refinements. It has been denounced as the growth of despotism, and unfit for a republican people; although its true history proves it to have been the best friend of rational liberty, and the boldest protector of the just rights of a people. When liberty sunk under the assaults and corruption of power in almost every nation of Europe, she maintained a dominion in England, by the strength of the Common Law.

Such declamations, against this invaluable system of jurisprudence, as unfounded in good sense as they are in sober truth, have had considerable success in degrading its reputation, and poisoning the public sentiment. Under a

persuasion that this desperate delusion may be dissipated by a fair exposition of the subject, I offer my mite to the cause, hoping it may serve as the commencement of better efforts.

Believing that an attempt of this sort has already been too long delayed; and that, if it may render any service, it must be speedily essayed, I venture to send this publication to the press, with a haste, that a zealous attention to my object requires, but which a regard for myself would prohibit. I do not even give it the chance of the correction and improvement it might receive from transcribing; being more willing to suffer the penalties of such an indiscretion, than longer to withhold my aid, inconsiderable as it is, in exposing errors, so gross in their conception and so fatal in their tendency.

Philadelphia, January 1, 1809.

CONSIDERATIONS

ON THE

Abolition of the Common Law.

MEN, acquainted with the origin, the nature, and the usefulness of the COMMON LAW, view, with astonishment and serious apprehension, the hostility manifested against it, for some years past, in Pennsylvania, and gradually ripening into a fatal action. The moment seems to be approaching when the axe will be laid to its root, and its spreading honours prostrated in death. Those who anticipate this event with joy, and give their aid to hasten its accomplishment, surely know not what they do. This object, devoted to a blind destruction, in its *origin*, has all that is venerable in antiquity; in its *nature*, it is the very essence of wisdom and experience, and in its *usefulness*, absolutely indispensable. Perhaps, the prejudice which is maintained and cherished against it arises, in some degree,

from an unconquerable hatred to its parent, or rather nurse, ENGLAND. Many men will not believe that any thing good can come out of Nazareth; and connecting our adoption of the laws of England with our former subservience to her, they cannot feel themselves completely independent until they have shaken off every thing derived from her. Can we reason with such men? But we may with those who are misled and deceived by them. A little reflection should satisfy the most inveterate of the folly of indulging a national antipathy, even if it be just and natural, in this way. As a young country we should draw improvement and succour from every source. We should use the experience of others, whether applied to arts, to philosophy, to literature or to government; not indeed by compulsion, but by free choice; not as forced to do so by any obedience due to those whose example we follow, but as rational beings, determined to seek our good wherever it is to be found, and to receive it whencesoever it may come. The discreet navigator disdains not an accurate

chart, because it may have been traced by the hand of an enemy. Why should we not use the experience of the British nation in the science of jurisprudence, as well as in the arts? Why should we not receive what is excellent in their law, as well as in philosophy and literature? The Common Law of England is congenial with the nature of an American; he has a birth right in it. His forefathers aided in forming it, and have surely left him no better inheritance.

The clamour raised against the COMMON LAW by prejudice, and extended by an ignorance of its real character and importance has, I fear, had an effect not easily to be counteracted. The men who have done this, may have their reasons for it; but the people who have been deluded by them, deserve a more respectful consideration and better information. They know not what they are called upon to destroy, nor how deep a repentance will follow the deed. They are abused, very much abused upon this subject. They have been taught to believe that the COMMON LAW is a mass of

magical mysteries, full of hidden dangers to life, liberty and property; a dark cloud, pregnant with mischief, and ever dropping poison and death.

I have always held that the PEOPLE of a country are never *wilfully* wrong. There is no reason or motive why they should be so. It would be a most unnatural self-destruction in them to pursue and consummate measures ending in their own ruin, with a full knowledge of their nature and result; and yet the lamentable experience of every country records in blood, how easily they are inflamed and misled; how blindly they follow their passions, how furiously they indulge them, and how deeply they repent it.

Could then the people of Pennsylvania be induced to believe and know, that the COMMON LAW, so despised, is the fountain of political wisdom; the palladium of our dearest rights, the great shield of our protection, they would assuredly cease to persecute it; they would honestly and valiantly defend it. If they can be convinced that without it the ad-

ministration of justice must be abandoned, the business of the country stand still, and confusion, uncertainty and injustice universally prevail; that the great standard of right and wrong would be thrown down, and our remedies and checks upon dishonesty, oppression and vice, utterly lost, can it be doubted that its meditated destruction will be averted?

A writer, who from the skill of his pen and the candour of his demeanour, is no vulgar reviler and not to be classed with those who assault the Common Law merely to indulge a passionate prejudice, or with more sinister views, has lately published the first number of a pamphlet, advocating the propriety of abolishing this system of jurisprudence in the United States, and substituting, in its place, one or more statutes to comprehend all those parts and provisions of the Common Law which are applicable to our form of government and situation. He has stated his reasons for this proposition, and promises hereafter to communicate the manner in which this project may be carried into effect. I regretted to learn,

upon inquiry, that it is not his intention to perform this promise very speedily, or I should have postponed the publication of my ideas of this subject until I had all his plan before me.

This author offers six reasons against the continuance of the COMMON LAW OF ENGLAND in the United States. Without repeating them literally, I will state their substance.

1. That its identity cannot be preserved in both countries, owing to the changes that are made in it in England, and other changes in America, by legislative regulations. That these changes will subvert its identity as a system, *and it must be gradually lost.*

2. That the Common Law is not, in many particulars, applicable to our situation or form of government. That it requires scientific investigation and professional skill to determine what parts are applicable. That the mass of the people cannot make this investigation, and it is of great importance every citizen should have a rule of action distinctly understood and comprehended by him before he commences his line of conduct.

3. That even in Great Britain the Common Law is not a *national* or *uniform* system. It does not extend over the whole island. This increases its intricacy, so that a professional character only can decide upon the right or wrong of a man's conduct; and that involuntary disobedience may hence arise in persons really disposed to obey the law.

4. That in some parts of the United States an American Common Law has grown into existence. In some the Common Law of England has been formally abolished; and thus it becomes more and more difficult to ascertain what is the Common Law. When an American leaves the particular state, to whose laws he has been accustomed, he becomes a stranger and is lost. He knows not what is the rule by which he should conduct himself, and is subject to involuntary error.

5. That the Common Law has been altered in England by acts of parliament and judicial decisions, some of which are recognised in some parts of the United States, and in other parts either rejected altogether, or admitted with li-

mitations and qualifications. It is therefore often impossible for a professional character to ascertain whether a particular construction will prevail in an American court, without an actual decision of the court to be procured only by delay, expense and embarrassment.

6. That many of the most valuable parts of the Common Law form the written basis of our governments, and thereby cease to be Common Law: on many subjects the Common Law is superseded by national or state laws. The penal code of the United States and the penal code of Pennsylvania supersede a great mass of Common Law. So the Pennsylvania system of descents; her regulations of intestates' estates; her rules respecting executors and administrators. That after taking away from those parts of the Common Law thus supplied, those which are inapplicable to our situation and forms of government; *the residue might be comprehended in a small compass; be reduced to writing, enacted by statute, and cease any longer to be Common Law.*

I do not propose to consider these reasons

in form and order; but I trust that a general view of the subjcet will satisfy the candid and intelligent, with whom I would class this writer, that many of his objections are not peculiar to the Common Law, but arise necessarily out of the very nature of an extensive system of jurisprudence, whether *written* or *unwritten;* and from the unavoidable imperfections of language by which law must be promulgated. That the difficulties and embarrassments he charges to the Common Law, in its use in the United States, would be perhaps increased, certainly not diminished, by acknowledging no rule of conduct but statute law; and in truth that many of them grow out of the nature of our confederation, in which numerous distinct states, each with an individual sovereignty, are collected for certain general purposes under one head, retaining still their separate rights of government in their respective territories. From this combination of general and particular sovereignties, with a diversified policy, and jurisdictions sometimes conflicting, confusion and perplexity does and must arise. But

the Common Law is so far from creating or adding to them, that it is almost the only common principle amongst us. The lawyer of Georgia will scarcely differ from the lawyer of New Hampshire upon a question to be decided by this authority; while the statutes and construction of statutes in the different states are as various as the mind and imaginations of man.

As to the plan of enacting into a statute so much of the Common Law as it will be useful to retain, I believe I can make it plain to the most ordinary understanding that it is absolutely impracticable.

The Common Law of England is "a collection of maxims and customs," which have been preserved in various authentic ways, "and handed down from times of the highest antiquity." It is in truth the common sense of mankind; it is human wisdom, corrected and taught by experience. A dispute takes place between A and B, on the construction of a contract or any other question of right. It is referred to the tribunal erected to administer

justice. It is decided. The same case is decided in the same way again and again. It becomes Common Law, and will govern other parties in the same circumstances. Is not this just, reasonable and convenient, furnishing a rule by which men may govern themselves; instead of being subject to the caprices or various opinions of various judges? Sir William Jones, a man of extensive learning, of unblemished integrity and decided republican principles, speaks of this Common Law in terms of exalted encomium: "I have just begun," says he, "to contemplate the stately edifice of the laws of England."

"The gathered wisdom of a thousand years."

And at another time he draws this parallel between common and statute law: "The Common Law is the collected wisdom of many centuries; having been used and approved by successive generations; but the statutes frequently contain the whims of a few leading men; and sometimes of the mere individuals employed to draw them; lastly the unwritten law is generally favourable, and the

written law generally hostile to the absolute rights of persons." To repel the idea of its being uncertain because unwritten, he observes, "Though this inestimable law be called *unwritten*, yet the only evidence of it is in writing, preserved in the public records, judicial, official and parliamentary, and explained in works of acknowledged authority." It is altogether a mistake to suppose that, because this law is called *unwritten*, it therefore has no certain evidence of its mandates; but relies upon the precarious testimony of memory, or floats in the minds and imagination of judges and lawyers. The term *unwritten* refers to its origin, not to its present existence.

Sir Matthew Hale, as eminent for the excellence of his virtue as for the extent of his learning and genius, declares that the Common Law "is the best, safest and truest rule of justice in all matter, as well criminal as civil." And so far is it from being inimical to liberty, that the preservation of that portion of freedom existing in the British constitution and enjoyed by the people, is undoubtedly the work

of the Common Law, which while "it asserts and maintains all the just rights, revenues, powers, prerogatives and government of the king, also declares and asserts the rights and liberties, and the properties of the subject; and is the just, known and common rule of justice and right between man and man."

The advocates of the Common Law, in the United States, do not pretend that it can claim any authority here, from the country whence we immediately derive it. It is not because it is *English* law that we would have it received and obeyed, but because it is the law of *reason* and *justice*. It should bind us, not as subjects of England, but as *men;* as reasonable creatures perceiving and pursuing our happiness; discerning and adopting that system of policy, best calculated to secure our individual rights, and preserve the general peace and safety of society. We take it then as the English obtained it. They have in a course of years collected it from all the nations with whom, from time to time, they have had intercourse, even from their enemies and conquer-

ors. They have been too wise to reject a good rule of conduct because it was of foreign growth. The Romans, Picts, Saxons, Danes, and Normans have all contributed to that wonderful mass of human wisdom, now called the *Common Law of England.* And at this day many of its regulations are in use in other countries of Europe. Our ancestors brought it with them; not as a badge of dependence and slavery, but as an invaluable right, and as such it has been considered by all Americans, until the late years of innovation and revolution. In the declaration of American independence one of the acts of tyranny and oppression, charged upon the British government, is the "*abolishing the free system of English laws* in a neighbouring province," as introductory to a similar proceeding towards us. And the second law to be found in the statute book of Pennsylvania, after the assertion of our independence, acknowledges and establishes the power of the Common Law. The legislators of that day saw the confusion into which the country would fall without it, and hastened to confirm

its authority. Patriotic as they were they felt no degradation of themselves or their country, in continuing a wise system of jurisprudence, although they disdained any allegiance to the government of the nation from which they received it. Chief Justice Tilghman, lately speaking of an English case, he had referred to, in deciding a question of insurance, said "that case is not an *authority* here, but entitled to that consideration which we pay to the respectable courts of all nations, when they found their decisions, not on a municipal regulation, but on general principles of maritime law."

Common Law is but another name for *common sense*, tested and systematically arranged by long experience. What governs the manners of men towards each other? It is the common law of social intercourse. What constitutes the habits and customs of a country, but a common law, gradually growing with civilization, and always accommodating itself to the situation of the people? Nor is the Common Law of jurisprudence less pliable. It is one of its

excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions. The history of England abundantly proves this. Whether the reigning prince was weak or strong; liberal or tyrannical; amidst the despotic power of Henry the eighth, as well as in the times of the commonwealth; in days of intestine discord, and in days of tranquillity, still the Common Law went on administering justice between man and man with very little interruption. Its political department, it is true, was more warped and disturbed, but it never failed to recover itself; and generally with additional strength and security. How admirable in its structure! It is so vast as to cover all the business of mankind, and so various as to meet all its exigencies. It is an elastic mantle that expands or contracts itself to every use, and may be shaped to every circumstance and situation; while it presides over the most momentous questions of

civil liberty, it also determines the most inconsiderable contract of petty dealing.

It is unquestionably "of immense importance that the citizen should have a rule of action distinctly understood and comprehended by him, before he commences his line of conduct," or indeed he may be led into "involuntary disobedience." But it remains to be proved, by the opponents of common law, that this desirable object will be obtained by its abolition, and the exclusive substitution of statute rules of conduct. The contrary is more easy to be demonstrated. In the first place common law being, in truth, nothing more than common sense and common justice, arranged into system, it is more likely to be known and understood by every intelligent citizen from the mere suggestion of his own understanding, than the arbitrary dictates of a single man, or any body of men, who promulge only their own individual sense of right and justice, in which they may materially differ from the sense of others on the same subject. Therefore the citizen can find no monitor, no legis-

lator in his own breast to determine him "in his line of conduct," and must act in the dark, unless he has the ability and the opportunity to consult the statute book, and the intelligence and good fortune too, to construe it exactly as it was intended by those who made it. This can be done by a very small portion of the community indeed. If I am told he may consult others when he doubts, so may he as to the common law, and with much more satisfaction and certainty. Besides the necessity of such a resort will sustain the profession of the law as a science; and this is clearly one of the great objects our innovators wish to avoid; and one of the objections urged against the present system.

That the law would become more *certain* and better *known*, by being positively enacted, in the form and manner of a statute, proceeding directly from the legislative authority of the Commonwealth, is a position which has an imposing plausibility on its first appearance. It vanishes, however, on a little investigation. Men, not used to examine subjects of this sort,

are apt to believe, that whatever is expressed in black and white, assumes a character of certainty as well as permanency, and can afterwards admit of no question. And yet how often are they deceived, in this respect, in the most simple concerns and contracts? How often do men really and conscientiously differ in their construction of agreements made in writing; and how much oftener are honest men perplexed and defrauded by the duplicity of construction in instruments, carefully composed and written, arising from the unavoidable imperfection and uncertainty of language. By turning to a dictionary it will be seen that scarcely a word in our language has a single, fixed, determinate meaning; and, of course, that you will change the sense of a sentence, as you shall adopt one or the other of the various interpretations of the words used in it. If this be true in the instances of ordinary contracts, generally with a single object, how do these embarrassments and uncertainties increase, in number and importance, in public laws, whose objects are so various and so ex-

tensive as to render it always difficult and sometimes impossible to embrace them, fully and precisely, in any form of words. Hence act upon act, and supplement upon supplement, to explain laws, comparatively simple in their objects. That language is by no means a certain and unquestionable method of conveying and fixing ideas, is proved in every branch of human knowledge, in every walk of science and genius. What violent controversies have arisen, what volumes of notes and comments have been written, to ascertain the meaning of many passages in our poets, and prose writers, whose peculiar business it was to understand language, and express themselves by definite, appropriate words. Even on the all-important doctrines of religion maintained by different christian sects, flowing or asserting to flow from the same divine source, founded upon the same written book, often on the same text or set of expressions, how do we see opinions directly adverse to each other maintained and solemnly and sincerely insisted upon? One man discovers the promise of

universal salvation, where another can see nothing but the eternal condemnation of four fifths of the human race. And yet, I presume, neither is wilfully wrong; undoubtedly they are not both right. I hope for the best. Whence then this difference, on a subject on which it is the solemn duty and interest of all to seek only the truth? From the imperfection of language, and the variety and perversion of the human mind and imagination. And thus it is in every system and science depending upon words for its understanding. But it may be asked, Is not the common law also subject to this inconvenience? Is it more certain? Undoubtedly it is; and partakes but in a small degree of this distracting contrariety of construction. The construction of the law, in fact, is the law; that construction which has been fixed by time, wisdom and experience. It has grown up with it; become an intrinsic essential part of it. It is incorporated in it. IT IS THE LAW. You cannot separate the law from the construction of the law. The same use, the same course of judicial experience and decision which made the rule has also fixed its interpretation, and

application. But statutes are unsettled and liable to misconception, until a course of judicial decision, which in fact is common law, gives them certainty and character.

"If" says sir William Jones, "you can be *safe only* in fixed, unanimous opinions of *Statute law*, you can seldom, I fear, act with perfect confidence. Such is the imperfection of human language, that few written laws are free from ambiguity; and it rarely happens that many minds are united in the same interpretation of them." He then relates this anecdote. "A statesman told lord Coke, that he meant to consult him on a point of law: If it be common law, said Coke, I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately."

The experience of the United States and of Pennsylvania, has already and abundantly proved, that intrinsic difficulties and ambiguities may exist in a statute penned with the utmost care; difficulties, not created by the cavils of lawyers, but dividing the judgments

of men of learning, independence and integrity, sincerely desirous to discover the meaning of the legislature, and honestly intending to carry it into effect. Some instances of this sort I shall, bye and bye, mention.

The common law, legislates by *principles;* the statute law, in *detail.* The former covers a multitude of cases, under a general rule, well digested; and explained, applied and universally known by a long practice. The latter, by attempting to provide for every particular case, and excluding every thing not expressly provided for, necessarily omits many cases, and would leave them destitute of any rule of decision, if the Judges had not the common law to fly to, to repair and supply the imperfect work of special legislation. In England the descent of an intestate's lands is directed by a few rules which scarcely occupy two octavo pages; and I do not know that a doubt has arisen about the construction of them, or the course of a descent, when the facts of the case are once ascertained. It is hardly necessary to except a speculative dif-

ference between Blackstone and Wooddeson, or a supposed case, that I believe, never has happened and is not very likely to happen. It is obvious that a course of descent which may be convenient to an ancient nation, with a full population, and under a monarchical government, would neither suit the state of our country, nor our more republican institutions. A change therefore in the descent of real estates was one of the first objects of Pennsylvania legislation. Since the settlement of the province, about fifteen laws, occupying a great space in the Statute Book, have been passed respecting intestates' estates. Alterations were found, from time to time, necessary; omissions were discovered by experience, and after toiling on in this way for more than one hundred years, cases have lately occurred, and more may occur, which, at this day are not provided for by the written laws of Pennsylvania; and which, without the friendly aid of the common law, would be without any rule of decision. If this has been the success on this single object of legislation, what encouragement have

we to extend the experiment to the infinite subjects of jurisprudence, vastly more intricate and complex, now governed by the common law.

This however is not the only source of embarrassment and doubt under this statute system. Errors may creep in in penning the law. A word inadvertently used or carelessly omitted; a comma misplaced by accident or ignorance, shall change the whole meaning of the clause. Indeed, I understand, that the punctuation of the laws does not come under the notice or direction of the legislature at all. The Bills printed for the members, which are all of the law they ever see, have not, in them, a single period, semicolon or comma. So that much is left to the engrossing or transcribing clerk, to make what he pleases of the act; by an ignorant or an artful use of punctuation. It may indeed happen, it certainly has happened, that the very men who make the law do not all mean the same thing by it. How then are others to discover or fix their meaning? and when they do mean the same thing, they still

are liable to be misunderstood from some ambiguity in the expressions they have employed to convey that meaning.

It cannot be doubted that in framing the constitutions of the United States and of Pennsylvania, which are written laws of the highest dignity, the most scrupulous attention was given to every phrase and word introduced into them, and the utmost care taken to avoid the possibility of misconstruction or doubt. And this was done by men of the first learning and talents in our country. Have they succeeded in so declaring their will, in so explaining their intentions, as to exclude doubt and controversy from these solemn instruments of legislation? Far from it. In the short period of the existence of these constitutions, more questions have been made upon them and seriously controverted, than could arise on the common law in a century. The constitutionality of the carriage-tax, requiring the decision of the highest legal tribunal in the United States to settle it; the suability of a state; the alien and sedition laws; the restric-

tion upon the importation of slaves; the naturalization laws; the repeal of the judiciary law of 1801, have all been questions on which our politicians and statesmen have divided in their opinions; and have all arisen out of one instrument covering but a few pages, enacted by the collected wisdom of these United States. Add to these, the case of the Invalid Pensioners; in which congress imposed certain duties on the judges of the supreme court, which they refused to perform, on the ground that the law was not warranted by the constitution. Congress afterwards repealed this law, being satisfied they had exceeded their power and misunderstood the constitution. What would have been our situation had each of these independent branches of our government persisted in its construction. Such is the uncertainty of written law. Nor has the constitution of Pennsylvania had a better fate. We have been quarrelling about constitutional questions almost from the hour of its birth. Was the recorder of the city of Philadelphia a judge or not? and could he by the constitu-

tion hold that office at the same time he held an office under the United States? was a question decided by the supreme court of the state. I believe that few members of the bar coincided with the opinion given by the court; and the legislature certainly did not, as they soon after passed a law in direct contradiction to it. I mention this only as a proof of a real ambiguity in the constitution, when such differences of opinion can exist about it. Such is the certainty of construction in written law. That provision of the constitution which directs the removal of officers on the address of the legislature to the governor, has furnished ample matter for controversy. Whether the address must be from both *houses*, or from both *branches;* and whether the governor *may* or *shall* remove on such an address are questions at this moment undetermined, and strongly contested. The right of the legislature to pass what is called the "*Twenty pound law*," and whether they thereby violated the trial by jury as given by the constitution is another pretty question. It was argued some

years since before the supreme court; and no opinion has yet been delivered; so that it is yet undecided.*

If, descending from our constitutions, we look at some of the laws that have been enacted by the legislature, we shall fall upon volumes of proof of the intrinsic uncertainty of statutes, in instances where more than ordinary care has been taken to avoid it. In the case of Peter Blight, a bankrupt, a question arose, under a law of congress, securing a preference to the United States over other creditors of insolvent persons, whether the United States were entitled to this preference on certain protested bills of exchange they had purchased, indorsed by P. Blight. This cause was tried in Philadelphia, before judge Washington and a very intelligent and independent jury. They decided the point against the claim of the United States. The case was

* Dec. 24th 1808, the opinion of the court on this question was delivered; but the law had expired for several years before its constitutionality was decided upon.

taken to the supreme court at the city of Washington. That court, differing from judge Washington and the jury, reversed the judgment of the circuit court, and awarded to the United States the preference claimed. Here then we have wise, learned and independent men, conscientiously differing about the construction of half a dozen words in a statute of the United States, really anxious to give it the direction and force intended by the lawmaker, if they could truly discover it. It cannot be doubted that the makers of that law would now, in like manner, differ in the construction of it. The same thing happened in the sugar refiners' cause, on a question of the liability of sugars in a certain state or situation to duty, under an act of congress. The court here differing from that at Washington; and different lawyers, in different parts of the union, holding various opinions. Could such things occur on a Common Law principle, or a case to be decided by it? A celebrated English reporter, at the conclusion of his report of the case of Perrin v. Blake, observes, "It is re-

markable that, excepting this case and another, there never has been from the 6th of November 1756, to the time of the present publication (May 1776) a final difference of opinion in the court in any case or upon any point whatsoever. It is remarkable too, that excepting these two cases, no judgment given during the same period has been reversed, either in the exchequer chamber or in parliament."

But our judicial records furnish a still more extraordinary case of the difficulty of ascertaining the meaning of the legislature, and fixing the true construction of a statute. I refer to the controversy between the HOLLAND COMPANY and the settlers on some of the lands the company had purchased of the commonwealth. The just decision of that dispute depended upon a few lines, nay principally upon three or four words in an act of assembly passed in the year 1792. The question came before various courts, all of whom were, doubtless, sincerely and anxiously desirous to discover what was the true intent of the legislature in the proviso at the close of the 9th section of that act, and

to carry into effect that intent when truly discovered. Yet such intrinsic doubts and difficulties were in the law itself as to distract and divide the judges of the several courts.

By the report of this celebrated case it appears that four different constructions had been put upon this proviso. In the year 1800 the supreme court of Pennsylvania gave their opinion on the act, the judges being divided and directly opposed. Chief justice Shippen in favour of the Holland company; judges Yeates and Smith, against them. The chief justice, in giving his opinion, declares, he "will not say it is free from doubt," but, he adds, "if the legislature really meant differently, all I can say is, that they have very unfortunately expressed their meaning." Judge Yeates says, "all the doubts of the case spring from the proviso at the close of the 9th section of the act;" and after stating the various constructions that had been put upon it, he says, "both sides agree in this, that it is worded very inaccurately, inartificially and obscurely." In 1802 the legislature, in the form of a law, gave

their opinion on the true meaning of the act of 1792; but as they were not the men who had passed it, they could judge of it and declare what was really intended, only as the judges had done, or any other men might do, from the words of the act. It was therefore only legislative *opinion*, and not a declaration of the meaning of the words made by the men who had used them. This opinion was however against the right of the Holland company, who after they had paid immense sums to the state for this land, and expended as much more upon it, find they have no right in it, and that they have been led into these enormous losses by misunderstanding, in common with many and learned men, a few lines of statute law. Where then is its boasted certainty, by which "a citizen may have a rule of action distinctly understood and comprehended by him before he commences his line of conduct."

The history of this important cause is not yet closed. The same question afterwards came before the circuit court of the United States held for the district of Pennsylvania.

Here too the judges could not agree in their construction of the act. Judge Washington adopting the construction of judges Yeates and Smith; and judge Peters that of chief justice Shippen. To the supreme court of the United States the case finally came, and a decision was there given in favour of the Holland company, which has since governed the circuit court of the United States; but whether it will have the same authority in state courts it is not for me to say. If not, what a scene of conflicting jurisdictions shall we witness, and what confusion, what everlasting litigation and uncertainty in the rights of property will be the consequence. The question now stands thus: chief justice Shippen, judge Peters and the supreme court of the United States on the one side; judges Yeates and Smith, judge Washington and the legislature of Pennsylvania on the other side. The title to an immense tract of country rests now upon this foundation. What consoling, absolute certainty is there in this statute law? Can a party who loses an important claim in this way, be sa-

tisfied that justice has been done? And this is not the work of lawyers, but of legislators, who undoubtedly intended no wrong, and are liable to no censure; but who, from the impossibility of excluding doubt from language, and of foreseeing all the cases that may occur under the law they pass, are the involuntary cause of such ruinous litigation.

I will mention but one other case in relation to this part of my subject. So long ago as the year 1705 an act was passed in Pennsylvania, authorising the orphans' court of the proper county, to order the sale of an intestate's real estate in certain cases mentioned in the act. One hundred years has not been sufficient to settle an uniform construction of this act; and different rules, all claiming to be founded on the true meaning of the legislature, at this moment prevail in different parts of the state. So that what is law to one citizen is not law to another. If the administrator of an intestate applies in one county for leave to sell any part of his real estate, he must show to the court not only that the deceased has creditors whose

debts cannot be satisfied from the personal estate, but also that he has left minor children whose education and maintenance require the sale. In another county an administrator procures an order of sale merely on showing the existence of debts beyond the amount of personal property, although there be no minor children.*

Thus it is that while Common Law proceeds on fixed, determined and uniform principles, the statute law, opening a wide range of construction, leaves so much to the opinion of the judge, as, in fact, to cease to have the certainty of a rule; and every separate tribunal dispenses the law, not by a common standard, but according to the varying opinions or caprices of the presiding magistrates, changing with every change of officer. In the construction of a deed, which is determined by the rules of the Common Law, there is seldom

* The supreme court gives an interpretation to an important provision of the insolvent law, the common pleas another. The judges of the supreme court, at this moment, are equally divided on the construction of that part of the constitution which relates to libels.

any difficulty; in a will, where the intention of the testator is to be sought out, the uncertainties and embarrassments are infinite.

Having thus, I trust, shown that the desirable certainty in the rules of conduct by which we are to govern ourselves, is not to be hoped for in a system of statute law; I will consider, with a view to show its impracticability, the plan proposed of enacting into a statute all such parts of the Common Law as are applicable or useful to us, and abolishing the residue.

In the first place, such a statute, embracing a vast variety of intricate subjects, and searching the most minute dealings of men, will be liable to all the uncertainties of construction and dangers of omission I have already pointed out, and in a tenfold degree. Every doubtful and ambiguous expression will lead into "involuntary disobedience;" and every case omitted, in this vast plan, will be without a rule of decision; unless referred to the *discretion of the judge*, which heaven forbid! The Common Law may not be resorted to, as it now is, as a kind succedaneum, a never fail-

ing resource. Certainly those persons who encourage the belief that all the Common Law we do, or need use, may be reduced to the form and body of a statute, do not consider the labour and extent of such an undertaking; the impossibility of accomplishing it. Years of toil and diligence would do it but imperfectly; the work would swell to a monstrous bulk, and after all, cases would occur, in the multiplied and involved transactions of men, which were not anticipated by the law-maker, and will of course be without rule or remedy. Such a statute should be little less than enacting into the form of an act of assembly, most of the elementary writers and judicial decisions on municipal jurisprudence. They are better as they are.

It is two years since the judges of the supreme court were called upon by the legislature to collect and report all the English statutes or their parts in use in Pennsylvania. It is not yet done, although, doubtless, all possible attention has been given to it; and, without the slightest imputation upon the talents and diligence of the gentlemen upon whom the

task is imposed, I think, I may venture to presume, from the very nature of the attempt, it will be done at last imperfectly and unsatisfactorily. What men, after exercising the utmost care, will be safe in saying, they have collected and reported all and no more than such statutes as are in use in whole or in part? that there is nothing omitted, nothing added, nothing doubtful? and yet how insignificant, how confined, how simple is such a work compared with the bold attempt to state precisely every necessary provision and regulation of the Common Law.*

In the reign of Justinian, the Roman jurisprudence was a mass of heterogeneous matter which had been accumulating for a thousand years. Its materials were of discordant natures, full of errors and contradictions, of superfluous and obsolete regulations. It was composed of the capricious ordinances of successive despots of various talents, dispositions and views; each moulding and making the law to gratify his peculiar propensity, or to advance his favourite object. These ordi-

* The report has just been made, since the above was written.

nances extended to numberless objects of municipal regulations, criminal and civil, of spiritual and temporal concern, for ever changing with the tenets of the reigning monarch. In addition to them were the voluminous collections of opinions, conjectures, disputations and decisions of the Roman civilians. How unlike the regular, the beautiful, the consistent system of the Common Law of England; founded on fixed, original principles of reason and justice, and not changing with the whimsies and passions of the ruling king, but binding him as well as his people. Ever improving itself by the lessons of wisdom and experience, but never receiving, as part of itself, the wickedness or folly of a blockhead or a tyrant. It has sometimes been violated, but never corrupted.

Justinian, vain, tyrannical, and contemptible as he was, saw the necessity, or felt the pride, of reforming the laws of his empire, and reducing them to something like a system. It was his happiness to have a most extraordinary man to direct this ponderous undertaking. The vast genius and diversified erudition of

TRIBONIAN were at his command. This great lawyer with nine learned associates, aided by the talents and experience of numerous advocates and magistrates, in fourteen months, revised the ordinances of the predecessors of Justinian, selecting those best adapted to the practice of the courts and the use of his subjects. In three years more Tribonian, with the assistance of seventeen lawyers, and with indefatigable industry and astonishing expedition, extracted from the decisions and theories of the Roman civilians, what he supposed to be the spirit of the Roman jurisprudence. The signature and authority of the emperor confirmed the result of these labours as the law of the empire.

Our projectors, for reducing all our rules of conduct to a written law, may here learn something of the labour and extent of their scheme. The great increase and variety of modern contracts and objects of municipal regulation, will require a statute more voluminous than the Institutes, Code and Pandects of Justinian. But is it not still more discouraging to the experiment to learn, that, after all

this incalculable labour and expense, a permanent, satisfactory and all comprehending system was not obtained. Justinian himself not only altered and repealed many of the laws thus carefully digested and solemnly enacted, but made additions to them of great extent.

So will it and must it be with our statute maker, be he ever so diligent, circumspect and learned. After he shall imagine his work is complete, and his toil successfully at an end, the experience of a day will discover something to have been omitted that ought to have been provided for; and something ambiguous or obscure that needs explanation.

But what is this Common Law which is thus to be gathered up, assorted and transcribed in the form of an act of assembly, as if it contained nothing but the rules of order of a social club, or the insignificant regulations of a petty corporation? Its objects and extent are described by sir Matthew Hale, and will appal the boldest statute maker from the attempt to collect, limit and specially recite them.

"The municipal laws of this country," says Hale, "which I call *leges non scriptæ*, are of vast extent, and indeed include in their generality all those several laws which are allowed as the rule and direction of justice and judicial proceedings, and which are applicable *to all* those various subjects *about which justice is conversant.*" And again, "The Common Law, in its usual and proper acceptation, is that law, by which proceedings and determinations in the king's ordinary courts of justice are directed and guided. This directs the course of descents of lands, and the kinds; the natures and the extents and qualifications of estates; therein also the manner, forms, ceremonies and solemnities of transferring estates from one to another; the rules of settling, acquiring and transferring of properties; the forms, solemnities and obligations of contracts; the rules and directions for the exposition of wills, deeds and acts of parliament; the process, proceedings, judgments and executions of the king's ordinary courts of justice; the limits, bounds and extents of courts and their

jurisdictions; the several kinds of temporal offences and punishments at Common Law, and the manner of the application of the several kinds of punishments; *and infinite more particulars which extend themselves as large as the many exigencies in the distribution of justice require.*"

Where now is the man or set of men who will undertake to frame a statute, which shall comprehend and specify in detail, all these important matters, or say, what parts may be dispensed with; or specifically to enact what they shall agree must be retained? Nothing can be more visionary or impracticable! Let us test the project by an anticipated experience. I will suppose that a statute is to be framed which shall be intended to adopt all such parts of the Common Law as are in use in this country, and shall be considered worthy of continuation. After which nothing is to be received as law in our courts, nothing is to be resorted to as a rule of decision, unless it be found in this wonderful statute, or in some written law enacted by the authority of

the legislature. What a task is here for those who are to make this omnipotent, omnipresent statute? I will suppose, however, the law-maker to begin with some common, every day case, for which he is to provide. We will take the case of a bond given for money lent. By the Common Law, and by no other law now existing, money lent upon a bond may be recovered in an action of debt. There is no difficulty in putting this into the statute. But the law maker must go on to specify, precisely, the manner in which this bond is to be made and executed, and the manner in which it shall be proved before a court and jury. Am I told, *every body knows that;* common sense will direct? Take care, *this is Common Law.* Stick to your statute, you have nothing to do with common sense; that, you say, is uncertain; you refuse any rule but the written one. Suppose the form of the bond is given in the act, are we then to exclude every obligation that does not exactly follow the prescribed form? The injustice of such a rule is obvious and infinite. But who is to extend the latitude of

the law and say any thing is a bond, but that which the act declares to be so? Open the door, and we are all at large again, and will, in spite of ourselves, from sheer necessity, be flying for relief to this odious Common Law. But there are more difficulties in fixing the *proof* than the *form* of the instrument. The Common Law, always insisting upon the best evidence the case admits of, and seeking the surest and purest fountains of truth, requires that the bond shall be proved by the subscribing witnesses to its execution; because they can prove the actual execution with more certainty than witnesses who can only testify from a knowledge of the hand writing of the obligor, or from any collateral facts; and because they may be able to relate circumstances or declarations of the parties, attending the execution, essential to the justice of the case. Shall our law-maker then write down in his statute, that a bond shall always be proved by the subscribing witnesses? I hope not. The Common Law is more reasonable. Although the general rule is, and ought to be,

as I have stated it, yet for the full and fair attainment of justice, there are many known and settled exceptions to it. The witnesses to the bond may be dead; they may be removed beyond the power and jurisdiction of the court, and of course out of the reach of the party requiring them; and then reason, justice and the Common Law says, we may use the evidence next in authenticity. Is it credible that any legislator can foresee and provide for all such cases? each depending upon its own circumstances. But the vast expanse of the Common Law, which has gradually grown by experience, providing for every occurring exigency, covers them all. Pray, will this statute declare whether it shall or shall not be indispensable to produce, in court, the bond on which the action is brought? Either rule would be inconvenient and unjust. Will you call upon the plaintiff to exhibit his bond, if it be lost or destroyed by accident, or in the possession of the defendant by fraud or negligence; or will you undertake to specify all the circumstances under which the production may be dispensed

with, and the manner in which such circumstances shall be established or proved.

It is to be remembered that these difficulties and embarrassments are not created by the law or by lawyers; they arise out of the very nature and intricacy of human affairs; from the variety of transactions between man and man; the different circumstances that attend them, and the accidents to which they are liable; constantly changing their equity and requiring different rules of decision. As the human body is subject to various diseases, so are human affairs to various modifications; and the physician, who would prescribe the same remedy for every complaint, is as wise as the legislator, who would enact the same rule for every case.

But we have not yet got through our statute. If the framer, by a success almost superhuman, shall surmount all these impediments, and introduce into his law every thing necessary on the part of the obligee of a bond, in every possible case, let him not imagine his troubles are at an end. They are but begin-

ning. He must now take up the other side of the case, and state, precisely too, every fact and circumstance which shall justly acquit the obligor from the payment of his bond. What a prospect now opens to him! how boundless the field! yet every foot, nay every inch of it, must be explored, surveyed and laid down with exact figure and dimension, or something will be left undone which justice requires to be done. The Common Law completely covers it all; not by the *fiat* of a single act, but by the toil, circumspection and wisdom of ages. These difficulties, let me repeat, are not created by the chicanery of law and lawyers, but by the ingenuity of knaves, ever inventing means to elude the law and defraud the unwary in their contracts. In order to protect the latter, the law must penetrate the labyrinths of the former, follow them in all their windings, expose them to detection and prevent their success.

The law-maker then (if he is to give us the same security we now have,) in setting out the means by which the payment of a bond

may be avoided, and in enacting into written law so much of the common law as is here indispensable, must travel through and accurately mark, all the doctrines of consideration; want of consideration; illegal consideration, as against morals or general policy; frauds, legal and moral; infancy; coverture; bonds, void and voidable. Can human wit or foresight frame a statute that shall embrace the infinite cases under these circumstances? and yet they are, in one shape or another, of daily occurrence. The law must be a mere transcript of the numerous volumes of judicial opinions upon these subjects, or it must fail in providing for very many cases. Most, and perhaps all, of these observations apply to promissory notes of one description or another, which are now the usual vouchers of debt and as current as gold and silver. The tradesman too will find it equally impossible to settle his most simple accounts without the assistance of this Common Law.

But when we look at the various important contracts respecting real estates, and those

arising from our commercial transactions, as bills of exchange, policies of insurance, bottomry and respondentia bonds, with a long train of mercantile negociations, how irresistable is the conviction that an attempt to abolish the Common Law, by which these things are now well regulated and governed, and to substitute a written statute in its place, would be most fatally abortive, and produce a confusion that would destroy the very rights and distinctions of property; rob us of our certain remedies against wrong, and take away the means of obtaining our most simple and obvious rights? We must abandon not only our foreign commerce, but our internal traffic with each other; as in case of a dispute there will be no rule of right to which we can refer for a decision. Thousands of cases will be omitted in the statutes; and those that are introduced will be liable to all the uncertainties of ambiguous construction. Before we can know our rights or remedies or what is the law to which we should conform ourselves, years must pass away to raise a Common Law construction for

this statute, and to fix its meanings, by a course of practice and judicial decisions. So that after wandering a century or two in darkness and doubt, and suffering all the evils which such a state will inflict, we shall be most fortunate indeed if we find ourselves just where we now are. We shall leave the fast land to be tossed on the bosom of a boundless ocean; to be driven about by every tempestuous gust and resistless current, and the utmost of our hope must be to escape ruin and wreck; and regain the shore we so madly deserted. We shall look to it with tears of true sorrow, and in the bitterness of self-reproach.

The dangers and difficulties to be encountered in establishing a complete criminal code by statute, are scarcely less numerous and formidable than those which would oppress us in civil cases. Every crime is now defined with mathematical certainty; and all its various modifications, shapes and circumstances, defences and palliations distinctly provided for, either by general rules and principles, or by particular decisions. So of the modes of trial,

the competency, credibility and examination of witnesses. Every thing is so constructed as to shield innocence from corrupt persecution and to bring the guilty to punishment; at least as far as human means can effect it. The degree of punishment in particular cases, is, as respects society, a minor consideration. In this the Common Law is sometimes sanguinary and severe; and has been, in many instances, humanely and wisely ameliorated.

To evince the impracticability of building up a penal code entirely by statute, let me again suppose the work begun. To give it the best chance, I will take the instance of a crime of daily and almost hourly occurrence, and apparently very simple in its nature. I mean an *Assault and Battery*. We will presume that the Common Law description of this offence shall be adopted, and the statute shall declare an assault to be an offer or attempt to beat another, and a battery to be the unlawful beating of another. Still it will be impossible for a court to decide whether a man charged with this offence is guilty or not, unless the statute

describes what shall be considered to be an assault, and what a beating. Is striking a man's hat, while on his head, or his cane in his hand, or spitting in his face, a legal beating? In like manner must we know what is the *offer* or *attempt* that is to constitute an assault, in what manner made, with what weapon, at what distance from the party assaulted, with various other circumstances. But it seems that merely *beating* another is not, in law, an assault and battery. It must be an *unlawful* beating. What then is an unlawful beating? And here the various justifications of a blow, the extent of its violence, with infinite modifications, to suit every possible case, must be distinctly and accurately recapitulated, or the code is essentially imperfect, leaving many cases unprovided for. If the person accused were first assaulted by the prosecutor, self-defence justifies retaliation, and yet this retaliation must have some reasonable bounds, must bear some just proportion to the nature, danger and violence of the first assault, or a man, under pretence of self-defence, may cover a barbarous

and inhuman outrage. Can the statute look to all such circumstances? It must however do, not only this, but much more, or the law will be deplorably deficient. It must set forth all the justifications arising out of the relations of husband and wife; master and servant; parent and child; tutor and scholar; the authority given to public officers to use personal violence in certain cases and under certain restrictions, with a great variety of other situations and cases. I must not be told that the reason of the judge and jury will determine such cases. Remember we are to have nothing but written statute law, the Common Law is too uncertain. For heaven's sake, do not let us, in a search after certainty, throw down the permanent rules of the Common Law, to erect in their place, the opinions, caprices and prejudices of judges and juries, who will deal out one measure of justice to-day and another to-morrow, as humour, favour or affection may incline them. Who, under such a system of criminal jurisprudence can be safe? Where can he find his "rule of action before he com-

mences his line of conduct," when it is locked up in the opinions of men he does not know, he cannot consult, but who are afterwards to put the stamp of guilt or innocence on his deeds.

How are these difficulties and dangers multiplied and enlarged, when we turn to a consideration of the more complex and important crimes of homicide, larcenies, forgeries, and an infinite class of frauds and misdemeanors. Should it be objected that other nations do without this English Common Law, the answer is plain; they must either have a Common Law of their own, or they refer very much to the discretion of the judge, or rather basha. We are too young for the first, and too wise, I trust, for the latter. Ordinances cannot embrace a twentieth part of the points of constant controversy. The rest must therefore be governed by the Common Law or by no law; that is, the arbitrary will of the judges.

The Common Law has undoubtedly undergone some alterations in England, by statutes and judicial decisions. The change in the situation of that country; the immeasurable in-

crease and extent of her commercial transactions, with the invention of new offences against morals or policy have made such alterations or additions necessary or convenient. But those great principles on which the people rely for the protection of their important rights; the rights of life, liberty, property and reputation, have suffered no material change. The mode of trial in criminal cases, by confronting witnesses and an impartial jury, in *the face of the public*, with all the rights of defence, remains the same. So do the important regulations relative to the possession and transfer of property.

It is not to be denied that our plan of political association so differs from that in England, that some parts of the Common Law does not suit our situation and form of government. Particularly those parts which more immediately regard political rights; but very few indeed of those regulations which govern disputes or dealings between man and man. But is it not wiser and safer to reject *only* such parts as are thus unsuitable, as experience

shall, from time to time, discover them, than to demolish the whole system on this account. Our admired declaration of independence tells us, "prudence will dictate that governments long established should not be changed for light or transient causes." This is equally true of a system of law, especially when the evils existing in it may be removed without a total destruction. I see no incovenience in the prediction that the Common Law "will become different in the two countries," if we retain so much of it as is useful and applicable to our state of society; and I see no difficulty in doing this. The writer, I have alluded to, himself asserts, that the Common Law will "*gradually* be lost here." Then surely if it must be lost, this is the best way of losing it. It is the safest way, and, of itself, renders a murderous extinction unnecessary at least. Why make an experiment, dangerous and uncertain in its issue, when the same effect, if *really desirable*, will be gradually produced by *time* and *experience*. It is more prudent to refer the decision of this momentous question to these great

teachers, than rashly to anticipate their decision, and execute what we presume will be their decree. Recollect what a shock would be given to the community by the annihilation of a system of jurisprudence, by which it has so long conducted itself; on the faith of which men have rested their most important transactions. It would be felt by every citizen in the commonwealth, from the purchaser of a penknife to the negotiator for millions. Let us rather go on as we have done, correcting and improving the system as our circumstances may require, and our experience shall dictate.

I will very briefly notice two or three popular notions in favour of the destruction of the Common Law.

1. It is supposed it will diminish litigation.

But have I not shown that litigation is at least as likely to arise on statute as on Common Law? Besides, a very great proportion of suits, grow out of controverted *facts*, differently asserted or differently understood by the respective parties, and not from any difficulty

in declaring the law when the facts are once fairly ascertained. This great source of litigation would not be diminished or affected by an exclusive statute law.*

* Sir Edward Coke, in a preface to a book of his reports, gives this testimony of the Common Law: "There are (saith Euripides) three virtues worthy of our meditation; to honour God, our parents who begat us, and these *Common Laws* of Greece. The same do I say of the Common Laws of England. For of all laws (I speak of human) these are most equal and most *certain;* of greatest antiquity and *least delay*, and most beneficial and easy to be observed; as, if the model of a preface would permit, I could defend against any man that is not malicious, without understanding; and make manifest to any of judgment and indifferency, by proofs pregnant and demonstrative; and by records and testimonies luculent and irrefragable. Sed sunt quidam fastidiosi, qui nescio quo malo affectu, oderunt artes antequam pernoverunt."

He then avers that "the greatest questions arise, not upon any rules of the Common Law, but upon conveyances and instruments made by men unlearned; having in them repugnancies and contradictions; and oftentimes upon acts of parliament, overladen with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law. In all my time I have not known two questions made of the right of descent, of escheats by the Common Law, &c. So certain and sure the rules thereof be."

2. That this reform would dispense with the services of lawyers.

Without inquiring whether the profession of the law is not as convenient and useful to the citizen as other professions, permitting him to follow his own occupation without interruption, and conducting his disputes better and cheaper than he could do it himself, how will this change in our jurisprudence dismiss the lawyer from society and sink his profession? Will he not be resorted to, as he now is, to discuss and expound questions of law, whether they arise on acts of assembly or on Common Law. Are consultations with lawyers confined to points of Common Law? Are they not as frequently called upon to advise in relation to statutes? And further, if lawyers have been found useful in collecting and arranging the facts of a case; in directing the kind and degree of evidence necessary to support it, and in giving to his client's cause every advantage of a full and fair discussion, will not all this remain under any system of law? and should it not? There is no

compulsion on any man to use this aid if he thinks he can do as well without it; and ought he to be deprived of it when he would prefer to use it?

3. That it will cure the delays with which the administration of justice is impeded and almost choked.

On this subject there is, indeed, just ground for the most serious and determined complaint. The ruin of suitors and the sufferings of justice imperiously demand some change in our judicial arrangements, and the organization of our courts. The burthen now imposed upon the judges of the supreme court is really intolerable, and inconsistent with the despatch of business. In addition to two long terms in Philadelphia, another at Sunbury, and another at Pittsburgh, they must annually traverse the whole state, from Delaware to Ohio, holding circuit courts in their way. We should have dromedaries for judges under such a system, able to sustain the fatigues of long and rapid journies and to endure the inclemency of every season. I do not mean how-

ever to say this is the only source of delay. But let us not attribute the evil to a wrong cause, or seek its removal in a mistaken remedy. It is not now to my purpose to inquire more particularly whence is the evil or where should be the remedy. It is enough to my present object to show that the Common Law is guiltless. I will do this by matter of fact, without comment. In England the Common Law marks the jurisdictions of their courts, and directs their judicial proceedings. At the close of a volume of Reports of Cases adjudged in the court of king's bench I find this memorandum by the reporter in 1776. "I am informed that at the sittings for London and Middlesex only there are not so few as EIGHT HUNDRED causes set down a year; *and all disposed of;* and although many of them, especially in London, are of considerable value, there are not more, upon an average, than between twenty and thirty ever heard of afterwards, in the shape of special verdicts, special cases, motions for new trial, or in arrest of judgment: of a bill of exceptions there has

been *no instance*. My reports give but a very faint idea of the whole business which comes before the court. Notwithstanding this immensity of business, it is notorious, that *in consequence of method and a few rules* which have been laid down to prevent delay, (even when the parties themselves would willingly consent to it) *nothing now hangs in court.* Upon the last day of the very last term, if we exclude such motions of the term, as, by the desire of the parties, went over of course, *there was not a single matter of any kind that remained undetermined*, excepting one case relating to the proprietary Lordship of Maryland which was professedly postponed on account of the present situation of America. One might speak to the same effect concerning the last day of *any* former term for some years backward."

What an eulogium is this, upon a Common Law administration of justice!

Do we not then by a candid consideration of this all-important subject; from a calm, unprejudiced view of facts and consequences, come with a full conviction to this result? That

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